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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 787

CITY OF EAST DETROIT, a Municipal Corporation, Aloysius L. Kapelczak, James E. Anderson, George S. Stone, Sr., Edward J. Bonior and Donald G. Tarnowski, as the Mayor and Common Council of said City and the Board of Appeals on Zoning of said City, and Charles H. Beaubien, as City Clerk and City Manager,
Petitioners and Defendants,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,
Respondent and Plaintiff

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARVEY A. FISCHER,
Attorney for Respondent The Detroit Edison Company,
1100 Dime Building,
Detroit 26, Michigan.

FISCHER, SPRAGUE, FRANKLIN & FORD,
LAURENCE M. SRAGUE,
GEORGE HOGG, JR.,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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COUNTER-STATEMENT OF THE CASE

For a complete understanding of the situation which gave rise to this litigation, Petitioners' Statement of the Case is inadequate and should be supplemented by the following:

On page 2 of the Petition, Counsel for Petitioners refers to a joint appendix filed in the Court of Appeals. This is an error. Petitioners and Respondent each filed a separate appendix.

The facts in this case are clear and undisputed. Substantially all of the facts are admitted by the pleadings (Complaint, 3a-15a,* and Answer, 15a-18a) and by the Stipulation of Facts (33a-42a).

The Respondent, The Detroit Edison Company, operates an integrated electrical system supplying electric energy to southeastern Michigan, (13 counties) including the City of Detroit and the Thumb area so called.

Because of the steadily increasing demand for electric energy in the Petitioner, City of East Detroit, and surrounding area, it is necessary that Respondent, build and maintain an electric transformer station in the area for the purpose of providing the type of electric service incumbent upon Respondent as a public utility to provide (Stipulation of Facts, 35a).

After investigation of all the sites within the area of the electrical load center for the transformer station site, the Collinson Avenue-Kelly Road location in the City of East Detroit was decided upon as the only available site.

The location of such a station is determined as a matter of engineering judgment. It should be located near the center of the growing electric load. After extensive surveys, it was determined that the site selected was the only one available near the proper location which would meet engineering requirements (66b-67b).

The parcel of property selected is located in an area zoned under the East Detroit Zoning Ordinance as R-1, One Family Residential Districts (Stipulation of Facts, 41a). The property constituting the proposed transformer

*Figures in parentheses followed by "a" are references to Petitioner's Appendix and those followed by "b" are references to Respondent's Appendix, each filed in the Court of Appeals and a part of the certified transcript of record in this Court.

station site is not subject to any building and use restrictions imposed by anyone in the chain of title (Stipulation of Facts, 35a-36a). It is in an area which in 1957 and today is only partially and haphazardly developed and much of the surrounding area is vacant land. The buildings vary markedly in value and architecture (21a; 29a; 12b-14b). There is no uniform plan of development or uniform architecture within the area (18b). The photographic exhibits (45b through 56b, inclusive) conclusively support the District Court's findings in this regard (21a; 29a).

The station will consist of (a) wires leading into the station, (b) transformers for stepping down the voltage, (c) wires leading out of the station, and (d) automatic controls. The station is not a building and no city permit is required for the construction. The "control shelter" which is a part of the station is a small building which when completed will house the delicate automatic controls governing the operation at the station. It will not be a place of residence.

On December 17, 1957, Respondent filed a request with the Planning Commission of Petitioner City for a permit, under Section 13.04(c) of the Zoning Ordinance of Petitioner City, to erect a control shelter or container on such site as part of the transformer station (Stipulation of Facts, 36a).

Respondent's representatives appeared before the Planning Commission at public hearings on January 2, 1958 and February 6, 1958 and with maps and drawings explained completely the nature of the project, the function of the control shelter as an essential part of the transformer station, and the absolute necessity of locating the transformer station in the area. Numerous objectors appeared at these meetings whose questions were answered.

On February 6, 1958, the Planning Commission was unable to agree on granting Respondent's request and referred the request to the Board of Appeals on Zoning (Par. 8 of Complaint, 6a, admitted by Par. 8 of Answer, 16a).

The Petitioner, Board of Appeals on Zoning, held public hearings on Respondent's request on February 18, 1958, March 1, 1958, and March 3, 1958. Respondent's representatives again made a complete and factual showing as to the necessity for locating and building the transformer station, the character of the station, the function of the control shelter, and the public necessity for the station being built in the approximate location of the site. Numerous objectors appeared and presented their objections (Par. 10 of Complaint; 8a, admitted by Par. 10 of Answer, 17a).

On March 3, 1958, the Petitioner Board of Appeals on Zoning unanimously approved the request of the Respondent for construction of the control house "• • • subject to the proposed brick wall construction on Collinson Avenue having a proper set-back, the ingress and egress to the project being from Kelly Road, and the Architecture Plans to be approved by the City Planning Consultant and then submitted to the City Council for final approval" (Par. 10 of Complaint, 8a, admitted by Par. 10 of Answer, 17a).

Respondent then made changes in its plans to comply with the suggestions of the Board of Appeals and submitted them to Waring & Johnson, the planning consultants to the City of East Detroit, who wrote an opinion reading in part as follows:

> "• • • We have given this subject matter careful consideration and have made numerous suggestions for changes and additions to the original plans. We have attempted to be reasonable and fair in mak-

ing these suggested changes, all of which Detroit Edison Company was acquiesced.

* * * * *

We therefore approve these plans as complying with the conditions imposed by a motion of the City Council of East Detroit at their regular meeting held on Monday, March 3, 1958.

We recommend approval of these plans, site plan #5XA842-4 dated 4/4/58, and perspective elevation drawing #5XA842-6 dated 5/7/58, as complying as far as is reasonably possible to the requirement of the Zoning Ordinance and to City Council Motion of March 3, 1958." (See Exhibit 16, Respondent's Appendix, p. 41b.)

Prior to this action of the Board approving Respondent's request the Board had conducted public hearings on two occasions (57b-64b; 65b-92b; 93b-101b); the Board had heard detailed objections from those opposed to Respondent's request (69b-74b; 97b-98b); and had opened the hearing to the public generally, regardless of immediate interest (59b-64b; 96b). The Board had been advised by attorneys (60b-61b; 81b; 80b; 99b; 103b) and had met in executive session (63b). Numerous suggestions and conditions, subsequently complied with, were made by the Board to Respondent (102b). The Board had all the facts before it on March 3, 1958.

During the campaign for a municipal election to elect two councilmen, held in Petitioner City on April 7, 1958, a member of the Southeastern Property Owners Association distributed a scurrilous and libelous circular attacking Appellee, and the Councilmen of Petitioner City for having granted Respondent the permit for the erection of the control shelter (Exhibit 10 (Exhibit 1, Bill of Complaint) 2b; 19b; 9a; 17a; 37a). As a result of this election

of April 7, 1958, two new Council members, Petitioners Bonior and Tarnowski, were elected to the Council, and, by virtue thereof, to membership on the Board of Appeals on Zoning (9a; 22a; 7b).

At a meeting of the newly constituted Board of Appeals on Zoning on April 28, 1958, letters were read from several property owners associations protesting the Council's action, as the Board of Appeals, approving the Respondent's request to build a control shelter as part of its transformer station. These associations requested immediate action to rescind the previous decision (108b). The Southeastern Property Owner's Association then requested a rehearing on the Board's action. After discussion and negotiation, the Board agreed to and did grant a "rehearing" on May 12, 1958 in exchange for a public apology and a public retraction of the libelous circular printed and distributed in the community (Stipulation of Facts, 36a-38a; 35b; 106b; 108b; 109b).

On May 12, 1958, Respondent's representatives appeared before the Board, at request of the Board, and submitted the final plans which had theretofore been approved by the Planning Consultant as required by the Board's March 3, 1958 resolution. Respondent expressly refused to submit itself to a "rehearing," claiming lack of authority of the Board to conduct a "rehearing." The Board thereupon unanimously adopted a motion denying and rejecting Respondent's plans because the "* * * Plan does not conform harmoniously with the general architecture and plan of such district * * *". Shortly thereafter the Southeastern Property Owners' Association circulated a public announcement entitled "Victory" (Par. 14 of Complaint, 10a-11a, admitted by Par. 14 of Answer, 17a; 3b).

On March 27, 1958 certain property owners, filed suit in the Circuit Court for Macomb County, State of Michi-

gan, to enjoin Petitioner City from issuing to Respondent the requested permit. Respondent filed a petition to intervene as party defendant in that suit but, while the petition was pending, the East Detroit City Council passed its resolution of May 12, 1958 rendering the issues in the case moot (Stipulation of Facts, 42a). Some of those property owners filed a petition to intervene as party defendants in the District Court and their counsel took part in the proceedings in that Court. Following judgment for Respondent, the District Court dismissed the Petition for Intervention (1a). The intervenors did not appeal the judgment of the District Court.

The District Court made findings of fact and conclusions of law and on November 10, 1958 entered judgment for the Respondent.

This judgment was affirmed by the Court of Appeals on December 14, 1959.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioners plant their right to review by writ of certiorari on the claim that the Court of Appeals decided an important question of state law in a way in conflict with applicable state law. They fail to state what state law they rely upon or how the decisions of the Federal Courts are in conflict with state law.

There were only two legal issues presented to the Court of Appeals:

(1) Was the transformer station excepted as an "essential service" from the provisions of the East Detroit Zoning Ordinance?

This involved a construction of the city's ordinance. No state statute was in any way involved.

The answer to this issue is obvious. It involves only the application of the plain and unambiguous language of the Ordinance to stipulated facts. No court could come to a different conclusion than did the District Court and the Court of Appeals.

(2) Did the East Detroit Council sitting as a Board of Appeals on Zoning have power to grant a rehearing after the expiration of five days on the Company's petition for a permit?

This involved a construction of the State Zoning Act.

As to this second issue, whether the Zoning Board of Appeals had power to grant a "rehearing," the Court of Appeals followed the latest Michigan case construing the applicable provisions of the State Zoning Act *McVeigh v. City of Battle Creek* (1957) 350 Mich. 214; 1 Mich. C. L. '48 §125.585; (4A M. S. A. §5.2935,) Counsel for Petitioners admits this was correct on page 7 of the Petition.

This leaves only one issue, the meaning of the "essential services" provisions of the East Detroit Zoning Ordinance, which the federal courts are alleged to have construed in a way which is in conflict with state law. Petitioners have not specified what the conflict is. As a matter of fact there is no conflict.

On pages 10 and 11 of the Petition, counsel states that other matters of state law are "involved". We do not know what counsel means by "involved" but certainly none of the three matters mentioned was in issue, nor discussed, nor decided by either of the Federal Courts.

Each of these items (itemized as A, B and C on pages 10 and 11 of the Petition) is completely frivolous and with-

but merit. None of them was raised or considered in either of the courts below.

A. Counsel asserts that the "essential services" provision of the East Detroit Ordinance destroys the "uniformity requirement" of the zoning enabling statute (1 Mich.; C. L. '48 §125,583; 4A-MSA §5.2933).

The short and simple answer is that the blanket "essential service" exemption of the ordinance applies uniformly to all zoning districts, not merely to those of the same classification.

This argument is patently frivolous and was not urged in the courts below.

B. It is next asserted that unprecedented local administrative procedures were approved because,

(1) Only the City Planning Commission could grant the permit for the control house requested by Respondent, and did not do so by virtue of its tie vote and referral to the Board of Appeals on Zoning.

(2) The Board of Appeals on Zoning granted the requested permit on March 3, 1958 but Petitioners claim it had no authority to do so.

Petitioners themselves answer point (1) by their argument on page 11 that the authority purportedly vested in the Planning Commission to grant the permit is illegal and void. Under the Zoning enabling statute, Planning Commissions, Petitioners claim, are limited to advising and recommending. Respondent sees no need for extended discussion of an issue which Petitioners raise and then refute in their own argument. There can, therefore, be no objection to Respondent's failure to secure a permit from a body which Petitioners insist has no legal authority to grant permits.

As to point (2), short references to the zoning enabling statute and the East Detroit Zoning Ordinance show the existence of complete authority for the Board of Appeals on Zoning to grant the requested permit on March 3, 1958.

1 Mich. C. L. '48 §125.585 (4A-MSA §5.2935), the section of the City Zoning Act which authorizes the creation and provides for the duties of a Board of Appeals, provides in pertinent parts as follows:

> (a) "* * * Such board of Appeals shall hear and decide appeals from and review any order, requirements, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the provisions of this act. *They shall also hear and decide all matters referred to them* or upon which they are required to pass under any ordinance of the legislative body adopted pursuant to this act. Such appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the city or village * * *." (Emphasis supplied.) (Petition page 16.)

Article XIV of the East Detroit Zoning Ordinance adopted pursuant to the above enabling statute provides for the duties of the Board of Appeals on Zoning as follows:

> * * * * *
>
> 14.05 Jurisdiction and Appeals
>
> (a) The Board shall hear and decide appeals from and review any order, requirements, decision or determination made by an administrative official charged with the enforcement of this Ordinance. *They shall also hear and decide all matters referred to them* or upon which they are required to pass upon this Ordinance (28b). (Emphasis supplied.)

Under both the enabling act and the Ordinance, the Board of Appeals on Zoning had authority to decide mat-

ters referred to them. That is what the Board did in this case.

In summary, two conclusions are evident from Petitioner's contention B. The first is that any claimed "unprecedented local administrative procedure" was followed solely because the Respondent was required to follow the procedure established and required by Petitioners. The necessity of exhausting all administrative procedures and remedies is an explicit reason for Respondent's compliance with whatever procedure was set down by Petitioners. The second is that Petitioner obtained a permit from the only body (Board of Appeals on Zoning) which had authority under the enabling statute to grant such a permit. The power of Appeal Boards to grant variances and special exemptions is well known under practically all Zoning Statutes. The failure to secure a permit from a body (Planning Commission) that Petitioners contend had no authority to grant one surely cannot be objected to.

C. Petitioners' argument concerning procedure for amending the Zoning Ordinance has no merit at all. This case involved no amendment to the existing ordinance. It is concerned solely with clear rights under the then existing ordinance. Any discussion about ordinance amendment serves only to obfuscate the simple facts of this case.

The only issue is whether the construction of "essential services" provisions is contrary to state law.

ARGUMENT

The issues presented to and decided by the courts below in no way justify the issuance of a writ of certiorari by this Court.

At the outset we wish to emphasize that the issue which Petitioners are now seeking to inject into the case was not

raised by the pleadings nor in the District Court or the Court of Appeals. Counsel for Petitioners admit this on page 9 of the Petition.

This court does not consider questions not presented to the courts below:

> *Helvering v. Minnesota Tea Co.* (1935) 296 U. S. 378, 80 L. Ed. 284;
>
> *McCullough v. Kammerer Corp.* (1945) 323 U. S. 327, 89 L. Ed. 273;
>
> *McGrath v. Mftrs. Trust Co.* (1949) 338 U. S. 241, 94 L. Ed. 31.

Furthermore, the issue tendered by Petitioner has no substance.

The issue urged by Petitioner involves the construction of the definition of "Essential Services" appearing as Sec. 2.20 and of Sec. 4.14 of the East Detroit Zoning Ordinance, reading in part as follows:

> "2.20 * * * The phrase 'essential services' means the erection, construction, alteration or maintenance by public utilities * * * of * * * electrical * * * transmission or distribution systems, including poles * * * (but not including buildings) reasonably necessary for the furnishing of adequate service by such public utilities * * * for the public health, safety or general welfare" (48a).
>
> "4.14 * * * Essential services shall be permitted as authorized and regulated by law and other ordinances, it being the intention hereof to except such essential services from the application of this Ordinance" (49a).

Counsel for both parties made a stipulation of facts in the District Court. Paragraph 10 reads as follows:

> "The control shelter protects the delicate electrical controls which provide for the automatic operation of this electrical transformer station. *These controls along with the station of which they are a part, are an integral and necessary part of the electrical transmission and distribution system of The Detroit Edison Company.*" (36a) (Emphasis supplied.)

This stipulation removes any problem as to whether a transformer station is an "essential service". The parties through their attorneys have agreed that a transformer station is "an integral and necessary part of the electrical transmission and distribution system of The Detroit Edison Company".

The District Court and the Court of Appeals both held that under the literal meaning of the Ordinance the station was an "essential service" and exempt from the Ordinance. How could any State Court hold otherwise?

The Court of Appeals said:

> "Under *the plain language of the zoning ordinance* appellee had the right to construct, erect and maintain its electrical transmission system without any permit *as this was expressly excepted* from the operation of the ordinance. The Company needed only the permit to construct the control shelter for its electric transformer station. This was an integral part of its system without which it could not be operated or maintained." (Emphasis supplied.) (Appendix to Petitioners' Petition pages 26 and 27.)

Petitioners fail to show how any state court could possibly come to any other conclusion. The State Zoning Act is not in any way involved in this phase of the controversy. What is involved is the application of the plain and un-

ambiguous language of the City Ordinance. This claim has no merit.

This is a diversity case. Respondent started this case in Federal Court to escape the effect of the political propaganda which was building up in East Detroit, Macomb County.

In such a case the Federal Courts have performed their duty in deciding (in accordance with state law) the two simple issues that were necessary for decision. In interpreting the "essential services" provision of the ordinance the District Judge and the Court of Appeals acted as would the Michigan Courts. The interpretation cannot be said to be a difficult one nor one involving a fine and intricate analysis of state law.

The duty of the Federal Courts to act in diversity cases, even where the issues are complex under state law, is set forth in *Meredith v. City of Winter Haven* (1943) 320 U. S. 228, 88 L. Ed. 9 where Mr. Justice Stone speaking for the court stated at pages 234 (or 13), and page 237 or 15):

> "* * * The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. * * * When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions

of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." • • •

"• • • *Erie R. Co. v. Tompkins*, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, *supra*, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining any applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain." • • •

It is to be noted that in the present case we have no federal or constitutional question, and it seems important to note that Petitioners do not themselves assert any constitutional question under the provision of Supreme Court Rule 19, 1 (b) as a basis for their petition for review on certiorari.

Application of the abstention doctrine in this case, where there is no serious federal or state constitutional question, nor a conflicting federal-state policy, would by reason of the extensive time involved in reinstituting suit in the state court cause unreasonable delay and impair the respondent's ability to provide adequate electric service to the public.

In *Meredith v. City of Winter Haven, supra*, Mr. Chief Justice Stone, in language fittingly applicable to this case, stated:

> "• • • We are pointed to no public policy or interest which would be served by withholding • • • the benefit of the jurisdiction which Congress has created with the purpose that it would be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. *To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.*" (pp. 237 or 9.) (Emphasis added.)

One can only conclude that the doctrine of abstention, urged in this court for the first time and at this late date, is raised solely to foster Petitioner's strategy of delay and to focus attention away from the lack of meritorious substantive issues of the case, which issues were resolved with comparative ease by both the District Court and the Court of Appeals.

On page 9 of the Petition, reference is made to a state court action which became "moot" (See Stipulation of Facts 42a). This reference was to a case pending in the State Court, the Circuit Court for the County of Macomb, yet the city and the intervenors abandoned this state case and submitted to the jurisdiction of the Federal Courts in this case. Should the city be permitted at this late date to reverse its field and say that the case should be decided in a State Court?

"Essential service" provisions or something similar are necessary in Zoning Ordinance to enable a public utility properly to serve the public. The location and construction of "a transmission and distribution system" is governed by engineering principles in view of the consumer demand.

They cannot be placed just anywhere. These provisions of the ordinance were enacted in recognition of this situation.

This case does not involve an important issue of general law. The issues raised in this case are not of special or general importance. As was pointed out above, the opposition to the construction of this substation is purely political. A small group of property owners in East Detroit have dedicated themselves to the program of excluding from the City any substantial commercial or industrial use.

For ten years such groups have succeeded through political intimidation of the City Council in preventing such uses of property within the city (See statement of Councilman Stone p. 101b). As a result the City has an inadequate tax base and the community has been injured.

In balancing the interests involved, we have first an electric utility serving an important area of the State of Michigan which finds it imperative to locate and build a transformer station. After waiting two years for litigation in two federal courts, it cannot wait longer to build this station without danger to the quality of its service to the public.

On the other hand we have a small group of property owners trying to prevent the station. None of these live in close proximity to the station. Actuated largely by emotional actors, they are trying by agitation and political pressure on the council to keep the station outside the City of East Detroit without regard to the merits of the situation. The interest of these people cannot outweigh the right of the general public in this area to adequate electric service.

CONCLUSION

This case presents none of the features which are usually thought necessary to justify the issuance of a writ of certiorari by this court. Petitioners have failed to define the errors committed by the Court of Appeals or to state the ultimate relief they seek if the writ is granted. No constitutional issue, federal or state, is even claimed to be present. No question of federal law is involved. There is no important issue of general law present in this case. On the one point of state law, i. e. the meaning of the "essential services" provision in the Zoning Ordinance of East Detroit, the Petition fails to show how a state court could construe this language in any other way than did the District Court and the Court of Appeals in this case.

The paucity of reasons for the writ set forth in the Petition leads to the conclusion that it was filed solely for purposes of additional delay.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

HARVEY A. FISCHER,
Attorney for Respondent, The Detroit Edison Company,
1100 Dime Building,
Detroit 26, Michigan.

FISCHER, SPRAGUE, FRANKLIN & FORD,
LAURENCE M. SPRAGUE,
GEORGE HOGG, JR.,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.

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